State of Maryland
State Labor Relations Board

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| In the matter of:<br>Maryland State Employees Union,<br>American Federation of State,<br>County and Municipal Employees,<br>Council 92 and International<br>Brotherhood of Teamsters<br><br>Petitioners,<br><br>v.<br><br>Department of Maryland State<br>Police<br>Respondent | SLRB ULP Case No. 05-U-04<br>Opinion No. 8 |

Decision and Order

Introduction

This case is before the State Labor Relations Board ("SLRB" or "the Board") on review of Administrative Law Judge (ALJ) Sondra L. Spencer's Proposed Decision, granting summary judgment in favor of the Maryland State Employees Union, American Federation of State, County and Municipal Employees, Council 92 and International Brotherhood of Teamsters (collectively, the "Union"). The ALJ found that the Maryland State Police ("MSP") committed an unfair labor practice by making unilateral changes to the terms and conditions of employment without first engaging in good faith bargaining with the Union.

On April 24 , 2006, the SLRB held this case in abeyance, pending the decision of the Court of Special Appeals in a related case *Ehrlich v. MSEU* (SLRB ULP Case No. 05-U-01; Cir. Case No. 24-C-05-003451, issued Jan. 17, 2007), discussed below. As the Court of Special Appeals has rendered a decision in that case, the SLRB now is ready to rule on the merits on this case. We find, in agreement with the ALJ,[1] and for the reasons explained below, that the MSP commit an unfair labor practice by making unilateral changes to terms and conditions of unit

[1] In so finding, we do not rely on the ALJ's finding that the MSP was not an agent of the State for bargaining purposes. It is clear that, under the Maryland Code that the MSP is a "principal department of State government," and that the State represents the MSP (as well as other state agencies) in bargaining. See Maryland Code, Public Safety Article § 2-201, State Government Article §§ 8-201, 8-201(b)(16), 8-203(a)-(c).

members' employment, without first bargaining with the Union.

Background Facts and Procedural History

The MSEU, AFSCME, Council 92 is the exclusive representative of state employees in AFSCME bargaining units A, B, C, D, F and H. There is currently no memorandum of understanding ("MOU") between the union and the State, as the two parties were unable to agree over ground rules governing negotiations.

On December 16, 2004, the Secretary of the Department of State Police submitted a memorandum to the Department of Budget and Management seeking review and approval for a change in the method of calculating holiday leave for employees designated to work an alternative workday. Whereas the holiday leave had been calculated on a twelve hour workday (prior to December 31, 2004), the Secretary of the DBM proposed that all holiday leave be based on an eight hour day, resulting in a loss of holiday leave for 12-hour shift employees. The Secretary of the DBM approved the change, and on December 21, 2004, MSP informed the Union of the upcoming changes and advised that he "would like to give the bargaining group prenotification and a chance to comment before the planned implementation date of January 1, 2005."

On January 4, 2005, the Union sent an email to the MSP, contending that the holiday leave policy was subject to collective bargaining and requesting a meeting to discuss the policy. MSP responded by email on January 14, 2005, that there was no MOU in place between the parties and that "collective bargaining law allows management to determine 'tours of duty.'" The MSP further notified the Union that the change in the method of capturing holiday hours would take effect on Monday January 17, 2005.

On May 11, 2005, the Union filed an unfair labor complaint with the Board, asserting that the MSP had violated SPP §§ 3-501(a) and (b) and 3-502(a), by failing to bargain with the Union over the changes, failing to notify the Union of the proposed changes, and failing to bargain over the effects of the changes to the schedules.

On July 6, 2005, the SLRB delegated its hearing authority to the OAH where the case was assigned to ALJ Sondra Spencer. The MSP filed a motion for summary judgment and the MSP filed a cross motion for summary judgment. Judge Spencer issued a recommended ruling in favor of the Union, finding that the MSP had committed an unfair labor practice by changing the holiday leave schedule for certain employees without first bargaining with the Union. The MSP filed exceptions to this decision, asserting that they were privileged to make such changes because the parties were at impasse in negotiations.

The SLRB initially deferred ruling on this case pending the decision of the Court of Special Appeals in a related case *Ehrlich v. MSEU* (SLRB ULP Case No. 05-U-01; Cir. Case No. 24-C-05-003451, issued Jan. 17, 2007). In *MSEU v. Ehrlich* (SLRB ULP Case No. 05-U-01,

Opinion No. 3, issued 3/11/05), this Board considered whether the State failed to bargain in good faith by requiring the Union to agree to certain ground rules (concerning media contact) before commencing collective bargaining. The Board found that the State's changes to working conditions without bargaining were lawful, in light of the fact that the Union had notice of those changes, but did not exercise its right to bargain. More pertinently, for purposes of this case, the Board found that the Union bargained in bad faith by refusing to agree to such ground rules.

However, on October 11, 2005, the circuit court for Baltimore City issued its decision (Case No. 24-C-05-003451), rejecting the Board's decision and finding instead that "nothing in the statutory language of the case relied upon by the State supports the State's argument that the Union's refusal to agree to this ground rule is evidence of bad faith."

The State appealed that decision and, on January 17, 2007, the Court of Special Appeals issued its decision in *Ehrlich v. MSEU*, No. 2015. In that decision, the Court of Special Appeals dismissed the Appeal, pursuant to Maryland Rule 8-602(a)(1), finding that the case was moot, as the issues concerned fiscal year 2006 and the parties had entered a new fiscal year. Nonetheless, the Court addressed the merits of the case and affirmed the SLRB's holding that the MSP did not violate labor law by suspending bargaining, because the Union had bargained in bad faith by refusing to agree with appropriate ground rules.

The SLRB originally had considered that these two cases are related because they involve the same threshold issue-- i.e. whether the parties had reached impasse over the ground rules before making unilateral changes to conditions of employment. However, the Court of Special Appeals did not address the issue of whether there was an overall bargaining impasse as a result of the disagreement between the parties concerning the ground rules before bargaining. Thus, although the Board had anticipated potential conflicting holdings, we find that the Court of Special Appeals limited holding does not implicate this case.[2] As the Court of Special Appeals has rendered a decision in that case, the SLRB now is ready to rule on the merits on this case.

Analysis

The Maryland Collective Bargaining Act sets out the rights of employees of the State of Maryland to enter into collective bargaining with the State concerning wages, hours and other terms and conditions of employment. Md. Code Ann., State Per. & Pen. ("SPP") §§ 3-101 through 3-602 (2004). SPP § 3-301(2) gives employees the right to "be fairly represented by their exclusive representative, if any, in collective bargaining." Further, SPP § 3-501 (b)

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[2]Moreover, although we are bound by our own precedent in *MSEU v. Ehrlich* (SLRB ULP Case No. 05-U-01, Opinion No. 3, issued 3/11/05), the facts of that case are sufficiently distinguishable from this case, as to mandate a different holding. For example, in *MSEU v. Ehrlich*, the Union initially failed to make a timely demand for bargaining after unilateral changes were announced by the employer. By contrast, as shown below, the Union did make a timely request for bargaining over the unilateral changes in this case.

obligates the State and collective bargaining representatives for employees of state agencies to "meet at reasonable times and engage in collective bargaining in good faith." Finally, § 3-502 defines mandatory matters of negotiations, stating: "Collective bargaining shall include all matters relating to wages, hours, and other terms and conditions of employment."

Under federal law, an employer is required by the National Labor Relations Act to maintain the status quo with regard to mandatory subjects of bargaining, while negotiating a collective-bargaining agreement with the authorized representative of its employees.[3] *NLRB v. Katz*, 369 U.S. 736 (1962); *Our Lady of Lourdes Health Center*, 306 NLRB 337 (1992). Indeed, an employer's obligation to refrain from unilateral changes in the wages, hours and other terms and conditions of employment of bargaining unit employees extends beyond the duty to provide notice to the Union and an opportunity to bargain about a subject matter. It encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991).

Thus, unilateral changes by an employer during the course of a collective bargaining relationship concerning matters that are mandatory subjects of bargaining are normally regarded as per se refusals to bargain. See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991), ("an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.") The Supreme Court has deemed such unilateral changes in working conditions to be destructive to the collective bargaining relationship. See *id.* As the circuit court for the District of Columbia has noted in *NLRB v. McClatchy Newspapers*, 964 F.2d 1153 (D. C. Cir. 1992), unilateral change "interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."

Maintaining the status quo during bargaining is particularly important where, as here, the parties are bargaining for an initial contract. See *In re Vincent Plastics, Inc.*, 336 NLRB 697 (2001) (NLRB found violation where employer unilaterally changed the employee attendance policy six months after bargaining started). The NLRB has long recognized that bargaining for an initial contract is especially difficult and that a newly certified union needs a year to establish itself in the eyes of the employees it represents. See *id.* (citing *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508 (1952); *Lee Lumber & Bldg. Material Corp.*, 334 NLRB 399, 404 (2001)).

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[3]We recognize that, as an independent agency of the state of Maryland, we are not bound by the precedent of the National Labor Relations Board ("NLRB"). However, the NLRB is the federal agency responsible for interpreting the National Labor Relations Act (NLRA), the premier federal labor statute governing collective bargaining in the private sector. See 29 U.S.C. § 151 et seq. Moreover, this state's collective bargaining law was modeled on the NLRA. Accordingly, that law is an instructive analytical framework in this case.

As applied to the facts of the instant case, we find that the MSP violated this state's labor relations law by refusing to negotiate before implementing changes in the method of calculating employees' holiday leave plans.[4] We first find that MSP's unilateral change concerned a mandatory subject of bargaining. MSP changed employee working conditions by decreasing the amount of holiday leave credited to alternative workday employees. Thus, employees who worked alternative work schedules and had previously been given holiday leave commensurate with their 12 hour shifts were suddenly given a reduced amount of holiday leave, on par with the 8 hour shift employees. Issues pertaining to vacations and holidays relate to the employees' working conditions and are considered mandatory subjects under federal labor law.[5]

Moreover, it is undisputed that the MSP simply informed the Union of its intention to make changes to its method of calculating holiday pay, including the implementation date for the changes. Indeed, the MSP only originally gave the Union eleven days of notice (during the holidays before the end of the year) of the upcoming changes and a "chance to comment" before planned implementation on January 1, 2005. Thus, arguably the MSP presented a "fait accompli" to the Union, which normally excuses the Union from making a bargaining request. See *Asher Candy*, 348 NLRB No. 60 (2006) (union excused from making bargaining demand, when presented with a "fait accompli").

In this case, however, the Union did make the bargaining request, which was refused by the MSP. Thus, after the MSP delayed the implementation date for the changes by two weeks, the Union made a formal request to bargain over the proposed changes on January 4, 2005. The MSP's refusal to meet with the Union and discuss the upcoming changes violated its obligation to bargain in good faith with the Union over unilateral changes to the employees' working conditions. See *Waxie Sanitary Supply*, 337 NLRB 303 (2001).

The MSP asserts that it was not obligated to give the Union an opportunity to bargain about the changes because the parties were deadlocked in their negotiations for an initial

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[4]At the time this complaint was filed, neither the legislature nor the SLRB had defined unfair labor practices. See SPP § 3-306(a) (prohibiting the State from engaging in unfair labor practices "as defined by the Secretary.") However, the collective bargaining statute SPP § 3-301 et seq. clearly requires the state and the Union to bargain in good faith with respect to "wages, hours and other terms and conditions of employment." Thus, despite the non-existence of defined unfair labor practices at the time this case arose, we construe this statute as requiring the state to bargain over unilateral changes in working conditions, consistent with federal labor law. As of July 1, 2006, the legislature amended SPP § 3-101 et seq., defining the unfair labor practices, and eliminating any future confusion on this subject.

[5]See, also, e.g. *Beverly Health & Rehabilitation Servs.*, Inc., 335 NLRB 635 (2001) (changes in work hours, vacation scheduling, etc.), enfd. in part, 317 F.3d 316 (D.C. Cir. 2003); *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133 (D.C. Cir. 1999) (institution of minimum production standards and change in vacation scheduling policy); *Visiting Nurses Servs. of W. Mass v. NLRB*, 177 F.3d 52 (1st Cir. 1999), cert. denied, 528 U.S. 1074 (2000).

contract, due to the Union's own bad faith bargaining. However, MSP is mistaken in this argument. First, we do not find that the parties had reached impasse in negotiations, because: (1) the disagreement concerned media coverage, which was not a mandatory subject of bargaining (i.e. affecting terms and conditions of employment), but a ground rule; (2) impasse requires that good faith bargaining precede the deadlock, and the parties had not yet even begun bargaining, but were in the preliminary discussion regarding ground rules. Moreover, even if the ground rule discussion could be construed as part of the bargaining process, it is well established that disagreement over one area does not constitute overall impasse. See *Bottom Line Enterprises,* 302 NLRB 373, 374 (1992) (employer required to refrain from unilateral changes during negotiations, absent overall impasse on agreement as a whole), enforced, 15 F.3d 1087 (9th Cir. 1994). Finally, to the extent that the parties were deadlocked on the ground rules concerning media coverage, such was not a mandatory subject of bargaining, and therefore impasse could not have been declared over that issue.[6]

We reject the MSP's assertion that the Union's bad faith in refusing to accept its ground rule excused the State from engaging in on-going bargaining. MSP had an ongoing obligation to refrain from unilaterally changing terms and conditions of employment, even in the face of stalled bargaining negotiations. Thus, MSP was required to maintain the status quo as to the employees' working conditions during collective bargaining, unless and until a new agreement was reached or the parties negotiated in good faith to impasse. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991). Thus, even considering the previous Union's bad faith in refusing to agree to the non-media coverage ground rules, the MSP's institution of a unilateral change was unlawful. See *Stone Boat Yard v. NLRB* , 715 F.2d 441 (9th Circ. 1983), cert. denied, 466 U.S. 937 (1984).

## ORDER

IT IS HEREBY ORDERED THAT:

Consistent with our Decision, we find that the State unlawfully implemented unilateral changes to the system for calculating employee holiday leave without giving the Union an opportunity to bargain first about those changes. In cases involving unlawful unilateral changes, the NLRB's normal remedy is to order restoration of the status quo ante, and this policy has been approved by the Supreme Court. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Indeed, restoration of the status quo is the only fair way to compensate the Union and employees for what they have lost as result of MSP's unlawful changes to the leave policy, and

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[6]Moreover, even if impasse had been reached, a unilateral implementation of terms not reasonably contemplated in a pre-impasse offer, or of terms never raised in negotiations, violates Section 8(a)(5) and indicates that the employer failed to bargain in good faith. *Caravelle Boat Co.*, 227 NLRB 1355 (1977). There is no evidence that the holiday leave was ever raised in negotiations; indeed, since substantive negotiations had not begun, there is no possibility that such a change had been discussed.

to encourage meaningful bargaining going forward.

Therefore, we order the MSP to reinstate its prior leave policy (i.e. in place prior to January 17, 2005) and to restore any leave lost by employees in the interim as a result of this change in policy. We further order the MSP, within 30 days of this order and upon request by the Union, to bargain with the Union about this policy change, as well as the general progress of negotiations. The parties shall report back to the Board with a progress report at the expiration of that time period, including an accounting of restored leave to the employees affected by the policy change.

BY ORDER OF THE STATE LABOR RELATIONS BOARD

Allen G. Siegel / ELS

Allen G. Siegel, Interim Chairman
Gail Booker Jones, Member
Sherry Lynn Mason, Member
Laird Patterson, Member

Annapolis, MD
April 26, 2007

Appeal Rights

Any party aggrieved by this action of the Board may seek judicial review in accordance with Title 10 of the State Government Article, Annotated Code of Maryland, Section 10-222 and MD R CIR CT Rule 7-201 et seq.

Concurring Decision,
Allen G. Siegel, Interim Chairman:

This is a particularly egregious case of flaunting the statute. The MSP action was, in my view, a blatant unfair labor practice that was transparent in its illegality. Precedent under our Maryland statute and under the National Labor Relations Act leaves very little sunlight between the MSP 's action and its obvious illegality. This is particularly distressing when such conduct is committed by a public safety organization, such as the MSP, an agency that should be a paragon of obedience to the law.

Unfortunately, it is well settled under the NLRA, for example, that the sole redress available under the Act is to "remedy" the illegal conduct, excluding any punitive action. In this instance such a limited remedy seems woefully inadequate. While I concur in the result, I would, if authorized by the statute, also assess an appropriate penalty. An appropriate example of such a penalty would be the liquidated damages and cost shifting provisions of the Fair Labor Standards Act.